SUPREME COURT, U. S.

DEC 13 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 910

EARL SPIGNER,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

This is a Petition for Writ of Certiorari to review a judgment of the Supreme Court of the State of California dated September 21, 1967, denying, without opinion, a hearing on the decision of the Court of Appeal for the State of California dated June 27, 1967, affirming the judgment of conviction and modifying the sentence in part. The judgment of conviction which was affirmed by the Court of Appeal was rendered by the Superior Court of the State of California on April 21, 1966.

A copy of the official opinion of the Court of Appeal

concerning the within matter, certified for non-publication, is attached hereto (Appendix "A").

A denial of a Petition for Hearing in the Supreme Court of the State of California was had, without opinion, on September 21, 1967 (Appendix "B").

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(3), the Supreme Court of the State of California being a Court of last resort.

STATEMENT OF THE CASE

By an Information filed on July 30, 1965, Petitioner and one Charles Hays were charged in one count with the crime of burglary (California Penal Code section 459). Petitioner was charged with burglarizing a Von's Shopping Bag Market located in the City of West Covina, County of Los Angeles, State of California, on April 10, 1965 (C.T.[1] 118).

By an Amended Information dated December 1, 1965, Petitioner alone was charged in Count I with burglarizing a Von's Shopping Bag Market located in the City of West Covina, on April 19, 1965. Count II of the Amended Information charged Petitioner with the crime of receiving stolen property (California Penal Code section 274). The stolen property alleged to have been received by Petitioner in

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1 As used herein, C.T. and R.T. refer to the Clerk's Transcript and the Reporter's Transcript, respectively, both of which have been made a part of the certified record.

Count II consisted of a Victor safe and approximately $24,900.00 in checks, money orders and cash, which property was allegedly involved in the burglary charge set forth in Count I of the Amended Information. (C.T. 119-120.)

In a Second Amended Information dated December 6, 1965, Petitioner alone was charged with conspiracy (California Penal Code section 182) to commit the crimes of violations of sections 459, 487.1 and 496 of the California Penal Code. Count II of the Second Amended Information set forth the same burglary count contained in Count I of the First Amended Information, and Count III of the Second Amended Information set forth the same receiving-stolen-property charge contained in Count II of the First Amended Information. (C.T. 121-124.)

On December 6, 1965, Petitioner pled not guilty to all counts contained in the Second Amended Information (C.T. 131). Petitioner had previously pled not guilty to the original information on August 23, 1965 (C.T. 127).

The certified record (page 134 of the Clerk's Transcript) contains an entry dated March 22, 1966. Esentially, this entry is on a written court form and states that the defendant and all counsel waive jury trial and further recites that it was stipulated by counsel that the matter could be submitted on the transcript of the preliminary hearing, with each side reserving the right to offer additional evidence. A copy of page 134 of the certified record referred to above is set fo th in Appendix "C" hereto.

On page 136 of the Clerk's Transcript, there is an entry dated April 21, 1966. This entry indicates that the court had read and considered the testimony contained in the

preliminary transcript, that the People rested, that Essie Spigner and Petitioner testified for the defense, and that Donald H. Miller testified for the People in rebuttal. Whereupon, the court found Petitioner guilty as charged in Counts I and II of the Second Amended Information and not guilty as charged in Count III. Petitioner was found, in Count II, to be guilty of burglary in the second degree.

On May 20, 1966, a motion for new trial was heard and denied. A Notice of Appeal was also filed on this date; bail on appeal was fixed; and a stay was granted pending a determination of the case on appeal (C.T. 139-140).

QUESTION PRESENTED

Whether an entry on a printed form docket sheet of the Clerk of the trial court, which recites that the defendant has waived his right to a jury trial and further recites that "by stipulation of counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing," constitutes a denial of the defendant's constitutional right to be confronted by the witnesses against him (Amendments VI and XIV, United States Constitution), especially in light of the fact that the ostensible waiver is not substantiated in the Reporter's Transcript.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are printed in Appendix "D." They are: Amendment VI and Amendment XIV to the United States Constitution.

STATEMENT OF FACTS

The following is a concise statement of the facts material to the consideration of the questions presented herein.

At page 134 of the Clerk's Transcript is found the Minutes of the proceedings held on March 22, 1966, in Department East A of the Los Angeles Superior Court. The Minutes are contained in a printed form of Minute Order which recites as follows:

> "Cause called for trial. The defendant personally and all counsel waive jury trial.
>
> "By stipulation of all counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings.
>
> "It is further stipulated that any exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this Court's ruling."

The matter was then continued for trial to April 20, 1966, and thereafter to April 21, 1966.

The Reporter's Transcript of proceedings shows (pp. 2 and 3) that Petitioner waived jury on March 22, 1966. On April 21, 1966, without any further waiver being taken from the defendant, the court stated (R.T. 4):

> "The record will show that I have received the Preliminary Transcript, which I have read

and considered in accordance with our previous stipulation. . . . "

No further indication that the Petitioner waived his constitutional right to be confronted by the witnesses against him is contained in the record.

REASONS FOR GRANTING THE WRIT

This Petition presents to the Court, apparently for the first time, a new and novel question of law. In essence, the issue presented is whether an entry on a printed form docket sheet of the Clerk of the trial court, which purportedly indicates that the defendant has waived his constitutional right to be confronted by the witnesses against him, without this waiver being substantiated in the Reporter's Transcript, is not in fact an insufficient waiver of this substantial constitutional right and, consequently, a violation of the right.

ARGUMENT

Whether An Entry On A Printed Form Docket Sheet Of The Clerk Of The Trial Court, Which Recites That The Defendant Has Waived His Right To A Jury Trial And Further Recites That "By Stipulation Of Counsel The Cause Is Submitted On The Testimony Contained In The Transcript Of The Proceedings Had At The Preliminary Hearing," Constitutes A Denial Of The Defendant's Constitutional Right To Be Confronted By The Witnesses Against Him (Amendments VI and XIV, United States Constitution), Especially In Light Of The Fact That The Ostensible Waiver Is Not Substan-

tiated In The Reporter's Transcript.

It is respectfully submitted that the entry which is contained on the printed form docket sheet of the Clerk of the trial court is insufficient to constitute either a waiver by the Petitioner of his right to be confronted by the witnesses against him or a personal stipulation that the court might read and consider the transcript of the proceedings had at the preliminary hearing and consider the testimony of those witnesses. The deficiency in the record is all the more acute since the Reporter's Transcript does not even contain any evidence that Petitioner's counsel consented to such a procedure.

Waiver has been defined as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 1026, 82 L. Ed. 1461, 1466. If, as in the instant case, the Petitioner has not been apprised of his right to be confronted by the witnesses against him, it is inconceivable that he can be said to have been aware of that right and to have waived it.

It cannot be doubted that an individual's right to be confronted by the witnesses against him is substantial and one which is within the protection of the Fourteenth Amendment to the United States Constitution. *Pointer v. Texas,* 380 U.S. 400, 85 S. Ct. 1065, 12 L. Ed. 2d 923. The crucial inquiries in the instant case are, therefore, twofold:

(1) Whether a recitation on a printed form docket sheet of the Clerk to the effect that it was stipulated that the matter be submitted on the transcript of the preliminary hearing is conclusive evidence of the fact that the Petitioner agreed to the submission on the transcript, irrespective of the fact

that the Reporter's Transcript is devoid of any reference to such a stipulation; and

(2) Assuming the stipulation was in fact made, whether an attorney can stipulate away the right to confrontation without the defendant's consent.

Petitioner has been unable to discover any cases decided by this Court which directly involve the issue herein presented. However, the Supreme Court of the State of California has very recently had the occasion to discuss the effect of a recitation in the docket that a certain act was in fact performed. In *In re Smiley*, 66 AC 634, the California Supreme Court was concerned with the issue of whether the defendant had been advised of his right to court-appointed counsel. The defendant contended he had not been so advised, but a docket entry indicated that he had been advised. In *Smiley*, the court stated:

> ". . . The official docket entries of that court show that petitioner appeared in propria persona, was 'duly arraigned,' pleaded not guilty, and thereafter defended himself without benefit of counsel. There is no entry specifically reflecting that petitioner was given the necessary advice as to his constitutional and statutory rights.
>
> "It is true that in *In re Woods* (1966) 64 Cal. 2d 3, 7 [48 Cal. Rptr. 689, 409 P. 2d 913], we held that a docket entry reciting that the defendant was ' "duly arraigned" ,' in a jurisdiction (Utah) having a statute identical to our Penal Code section 987, *supra*, required us to give effect to the presumption that 'official duty was performed' and 'the principle that every reasonable intendment must be made in

favor of judgments collaterally attacked,' by 'assuming' that the defendant was properly advised of his rights to counsel. . . . In . . . [*In re Johnson*, 62 Cal. 2d 325, at pp. 330-331] we made it clear we were not satisfied to rest a finding that the defendant was properly advised solely on a recital in the minutes that he had been 'duly arraigned'; we stated, rather, that since the rights involved were of constitutional dimension we would 'look to the entire record to ascertain the meaning of the entry,' . . . In view of the importance of the constitutional and statutory guarantees in issue, it does not appear too great a burden on the trial judges or clerks under their direction to require minute or docket entries specifically listing the rights of which the defendant is actually advised.[2] As the United States Supreme Court said in a related context, 'No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.' (*Miranda v. Arizona* (1966), *supra*, 384 U.S. 436, 471-472 [16 L. Ed. 2d 694, 722, 86 S. Ct. 1602, 10 A.L.R. 3rd 974]." (66 AC 634, 643-644.)

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2 At this point in the above-referenced case, the California Supreme Court set forth Footnote 8, which contained the following significant language:

"Such entries, of course, must be prepared for the particular case before the court; the requirements will not be satisfied by the use of minute forms containing printed recitals of this advice. [Citations omitted.]"

Although, of course, *Smiley* is in no way binding upon this Court, it is respectfully submitted that the case provides persuasive authority for the proposition herein advanced by Petitioner. Based on *Smiley*, it is respectfully submitted that the mere fact that the docket reflects a stipulation to submit a case on the transcript of the preliminary hearing does not mean that the defendant in fact consented to such a stipulation. It is further submitted that in light of the importance of the constitutional right involved, the waiver of this right cannot be presumed from such a recital or from a silent record. *Cf. People v. Salcido*, 246 ACA 512, 54 Cal. Rptr. 820, wherein the court held that it will be presumed from a silent record that the defendant has not been advised of his constitutional right to counsel. For the same holding, see also *People v. Furnish*, 63 Cal. 2d 511, 47 Cal. Rptr. 387; *People v. Liliock*, 62 Cal. 2d 618, 43 Cal. Rptr. 699.

As was indicated before, the right to be confronted by witnesses is a substantial one which the attorney for the defendant may not stipulate away. In this connection, and even assuming *arguendo* that the recitation in the docket can be construed to be a sufficient waiver by the Petitioner of his right to be confronted by the witnesses against him, the Court's attention is respectfully directed to the decision by the California Supreme Court in *People v. Davis*, 48 Cal. 2d 241, 309 P. 2d 1, wherein the court stated:

> ". . . It is a violation of his [an attorney's] duty of fidelity to his client to assume a position adverse or antagonistic to his '*without the latter's free and intelligent consent given after full knowledge of all facts and circumstances.*' (*Anderson v. Eaton*, 211 Cal. 113, 116 [293 Pac. 788, 789].)

> This consent was not given. *Without such consent an attorney may not surrender any substantial right of the accused. (Hoaglan v. Chargin,* 134 Cal. App. 2d 466, 474 [286 P. 2d 931]; *Redsted v. Weiss,* 71 Cal. App. 2d 660, 663 [163 P. 2d 105] nor may he impair, compromise or destroy his client's cause of action. [Citations omitted.]" (48 Cal. 2d 241, 256, 309 P. 2d 1, 9.) (Emphasis added.)

It is respectfully submitted that even assuming Petitioner's trial counsel stipulated to have the matter heard on the transcript of the preliminary hearing, such a stipulation was not binding on the Petitioner in the absence of evidence that he expressly waived his right to be confronted by the witnesses against him. Since there is not a scintilla of evidence in the record that Petitioner waived this substantial right, a reversal of the conviction must follow. In this connection, two decisions of this Court are pertinent:

In *Fay v. Noia,* 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837, the petitioner and two other defendants were charged with murder and convicted. The other defendants appealed but petitioner did not. Subsequently, the other two defendants utilized other legal machinery to procure their release from custody on habeas corpus. Petitioner sought his release and the state defended the petition by contending that petitioner had waived his rights by failing to prosecute an appeal. To this argument, this Court replied:

> ". . . The classic definition of waiver enunciated in *Johnson v. Zerbst,* 304 US 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357 – 'an intentional relinquishment or abandon-

ment of a know right or privilege' – furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits – though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. *Cf. Price v. Johnston*, 334 US 266, 291, 92 L. Ed. 1356, 1372, 68 S. Ct. 1049. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. *Cf. Carnley v. Cochran*, 369 US 506, 513-517, 8 L. Ed. 2d 70, 75-78, 82 S. Ct. 884; *Moore v. Michigan*, 355 US 155, 162-165, 2 L. Ed. 2d 167, 172-174, 78 S. Ct. 191. *A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. E.G., Rice v. Olson*, 324 US 786, 89 L. Ed. 1367, 65 S. Ct. 989." (372 U.S. 391, 439.) (Emphasis added.)

In *Fay*, the Court stated that the petitioner certainly

was not guilty of deliberately by-passing state procedures, because, under the law as it then existed, petitioner's choice not to appeal was undoubtedly based on the fact that if he appealed and was re-tried he would have been subject to the death penalty, whereas he was given life imprisonment after the first trial. Since, in the instant case, it can hardly be suggested that Petitioner was guilty of intentionally attempting to by-pass state procedures so that he could assert his federal constitutional rights, it is respectfully submitted that this Court's reasoning in *Fay* is applicable herein.

The following language of this Court in *Henry v. Mississippi*, 379 U.S. 443, 451-452, 85 S. Ct. 564, 13 L. Ed. 2d 408, is also relevant to the issue here under discussion:

> ". . . *Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims,* see *Whitus v. Balkcom*, 333 F. 2d 496 (CA 5th Cir. 1964), we think that the deliberate by-passing by counsel of the contemporaneous-objection *rule [*379 US 452] as a part of trial strategy would have that effect in this case." (Emphasis added.)

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Petition for Writ of Certiorari be granted and that the issues herein raised by given plenary consideration by this Court.

Respectfully submitted

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Appendix "A" - Opinion of the Court of Appeal of the State of California (1–9)

Appendix "B" - Denial of Petition for Hearing in Supreme Court of California

Appendix "C" - Clerk's Transcript page 134

Appendix "D" - United States Constitution
VI Amendment
XIV Amendment